IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7155 of 1993

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

J D GAJJAR

Versus

STATE OF GUJARAT

Appearance:

MR BHASKAR P. TANNA, Senior Advocate with
MS MAHROOK N. KERRAWALA for Petitioner
MR S.N. SHELAT, Advocate General with
MR PD BHATE for the Respondent

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 10/09/2004

ORAL JUDGEMENT

1.0 The petitioner by way of this petition has challenged the order of the State Government stated 18th June 1993, whreby the State Government has declined to

fix the pay pursuant to the representation made by the petitioner on 25th September 1992.

2.0 The case of the petitioner as emerging form the petition can be summarized as under:

2.1 The petitioner is an IAS and was working as Managing Director, GIDC, Ahmedabad. While in that office he was promoted to the rank of Additional Chief Secretary. By Notification dated 5.5.88 it was declared that the post of Managing Director, GIDC is equivalent in status and responsibilities to the post of Additional Chief Secretary to Government.

2.2 Pursuant to the recommendation of the Committee on Administrative Reforms headed by Shri G.C. Baveja, the State Government constituted the "Staff Selection Commission" for the purpose of appointment of Class III and Class IV employees of the State Government. The Commission will comprise a Chairman and other two members to be appointed on such terms and conditions as may be prescribed by the Government from time to time. The commission was also provided with a Secretary and such other supporting staff as may be considered necessary by the Government. Thus, this is a semi Public Service Commission qua Class III and IV employees and should be treated at par with the Gujarat Public Service Commission.

2.3 While the petitioner was working as Managing Director of Gujarat Industrial Development Corporation, he was transferred and appointed as Chairman of newly constituted Staff Selection Commission, Gandhinagar, by order dated 20th August 1988.

2.4 According to the petitioner, pursuant to Notification dated 17.12.88, on attaining superannuation with effect from 31.12.88, the petitioner was continued and his tenure was fixed as Chairman, Gujarat State Selection Commission for a period of six years or till he attains the age of 62 years whichever is earlier.

2.5 The Gujarat Administrative Department, vide order dated 7th August 1989 fixed the salary of the petitioner after considering different resolutions and notifications of the Government and his salary was fixed after deducting pension amount.

2.6 The case of the petitioner is that he was originally appointed as Chairman and he was retained and

therefore he should be paid the regular salary and his pay is required to be refixed by the State Government. The representation made by the petitioner in this context was turned down by the Government. Therefore the present petition has been filed.

3.1 Mr. Tanna submitted that pursuant to the Government notification at Annexure-B, the petitioner made a representation on 25th September and requested that the pay fixation may be done by the State Government which was wrongly rejected by the State Government. He further submitted that if the case of the petitioner is considered from 1st January 1989 and till he retires at the age of 62 i.e. in the year 1992, the petitioner is entitled for a sum of Rs.1,99,253/- along with interest thereon which was wrongly denied to the petitioner.

3.2 Mr. Tanna submitted that in the case of two IAS officers who were appointed as Chairman of Gujarat Public Service Commission were allowed to have full salary as well as full pension when they were Chairman and similar treatment should be given to the petitioner.

3.3 Mr. Tanna has relied upon Government Resolution dated 21s July 1980, whereby Shri K.N. Sutshi, Chairman, Gujarat Public Service Commission was allowed to draw full pension admissible to him in addition to the salary in full admissible to him as Chairman of GPSC under regulation 5(1) of the said Regulations. He has also relied upon another Notification whereby Shri V.T. Shah was allowed to draw full pension admissible to him on his voluntary retirement from IPS in addition to the salary in full admissible to him as Member, GPSC under Regulation 5(1) of the said Regulation.

3.4 Mr. Tanna submitted that since there are no rules, the State Government vide Resolution dated 26th March 1992 stipulating the terms and conditions regarding appointment, pay, leave, etc. of the Chairman and Members of the Gujarat Subordinate Services Selection Board i.e. formerly known as Gujarat Staff Selection Committee. Clause 3.1 to 3.3 which are relevant reads as under:

> 3. (1) Subject to the provisions of this G.R. there shall be paid to the Chairman a pay of Rs.6,000/(Rupees six thousand only) per mensum and to each of the members a pay of Rs.5,000/(Rupees five thousand only) per mensum, plus such

allowances as may be admissible on the said pay in the services of State Government from time to time.

Provided that a member who may be required to hold the charge of the office of the Chairman during the period of leave or otherwise shall be paid a special pay at the rate of Rs.300/(Rupees three hundred only) per mensum in addition to his own salary as a member subject to the condition that his total emolument in that case do not exceed Rs.6000/- per mensum.

2.If a Chairman or a member on the date of his appointment as such was in Government service in a permanent capacity and has not retired or reached to the age of superannuation under the rules applicable to such service, he shall except where he has agreed in writing to the contrary, be paid a salary equal to his pay in the pay scale of the post substantively held by him in the Government service or a salary as provided in sub-para (1) of para 4 whichever is higher.

3. If a Chairman or a Member on the date of his appointment as such is a retired Govt. servant and is in respect of the pension from Government, the Government shall determine whether his pension shall be held in abeyance and if so whether wholly or in part or in the alternative, shall determine whether the pay fixed by this order shall be reduced by an amount not exceeding the amount of such pension including such portion of it as may have been computed, if thepension is allowed to be drawn in full."

3.5 Mr. Tanna has relied upon clause (2) and submitted that the petitioner is entitled to draw full pension admissible to him in addition to the salary in full admissible to him as Chairman of Gujarat Subordinate Services Selection Board.

4.0 Mr. S.N.Shelat, learned Advocate General

Appearing for the respondent submitted that the petitioner was transferred on 20th August 1988 and he was appointed vide order dated 17th December 1988 and therefore it is not open for the petitioner to go behind the order inasmuch as on 31st December 1988 he has relinguished the charge which is produced on record at page 74 of the petition and on the next day he has resumed charge, copy of which is produced at page 75. Mr. Shelat submitted that in his own application dated 9th February 1989, the petitioner himself has stated that it is a reemployment, and he has given pension details and therefore it is not open for him now to claim any benefits.

4.1 Mr.Shelat submitted that vide order dated 7th August 1989 the State Government has passed an order and fixed the salary of the petitioner pursuant to the resolution of the Finance Department for payment of Rs.3713/- per month.

4.2 Mr. Shelat pointed out that pursuant to Rule 330, clause (a) and (b) the petitioner is not entitled for any revision of pay. Rule 330 reads as under:

330. (a) A person, who is in receipt of a superannuation or retiring pension, shall not be re-employed or continue to be employed in service paid from Consolidated Fund of India or a State or from a local fund, except on public grounds and in a purely temorary capacity.

(b) The authority competent to fix the pay and allowances, of the appointment in which the pensioner is re-employed shall determine whether his pension shall be held wholly or partly in abeyance. If thepension is drawn wholly or in part, such authority shall take the fact into account in fixing the pay to be allowed to him, provided that an authority subordinate to Government may not allow the pensioner to draw full pension in addition to the full pay of the post except when the re-employment or continued employment is for bona fied temporary duty lating for not more than a year or the pension does, not exceed Rs.25 a month; provide further that in the case of a pensioner whose pension exceeds Rs.25 but does not exceed Rs.75 a month the amount of pension (including pension equivalent of death-cum-retirement gratuity or gratuity in lieu of pension) equivalent to half the amount by

whaich the pension falls short of Rs.75 shall not be taken into account while fixing the pay to be allowed to such pensioner."

4.3 Mr. Shelat has also relied upon Rule 16 of All India Services DCRB Rules, 1958 which reads as under:

"16. Superannuation gratuity or pension - (1) A member of the SErvice shall retire from the service with effect from the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a member of the Service whose date of birth is the first day of amonth shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years:

Provided further that a member of the Service dealing with budget work or working as a full-time member of a committee which is to be wind up within a short period may be given extension of service for a period not exceeding three months in public itnerest, with the prior approval of the Central Government.

(a) for an aggregate period not exceeding six months -

(i) by the State Goernment, if the officer is workin in conenction with the affairs of the State Government; and

(ii) by the Central Government, if the officer is working in conenction with the affairs of the union or a State other than the State one whose cadre he is borne;

(b) for any period beyond six months -

(i) by the State Government with the prior sanction of the Central Government, if the officer is working in connection with the affairs of the State; and

(ii) by the Central Government, if the officer is working in connection with the affairs of the union or a State other than the State on whose cadre he is borne.

Provided further that a member of the Servie shall not be retained in servcie beyond the age of 60 eyars except in very special circusmtances.

Explanation - For the purpose of this sub-rule, a member of the Service whose date of birth falls on the 1st day of any month shallh ave attained the age of fifty-eight years on the afternoon of the last day of the preceding month.

Provided also that a member of the Service who has attained the age of fifty-eight years on or before the first day of may, 1998 and is on extension in service, shall retire from the servcie on the expiry of his extended period of service or on the expiry of any further extension granted by the Central Governmetn in public interest, and that no such extension in servcie shall be granted beyond the age of sixty years.

(1-A) Notwithstanding anythign contained in sub-rule (1), the Central Gvoernment may, if it considers necessary in the public itnerest so to do, give extension in service to the Cabinet Secretary in the Central Government for such period as it may deem proper, subject to the cndition that the total term of the incumbent of the post of the Cabinet Secretary, who is given such extension in service, does nto exceed two years.

(2) A member of the Service may, after giving at least three months' previous notice inw riting, to the State Government concerned, retire from service on the date on which such member ocmpletes thirty years of qualifying service ont eh date on which such member attains fifty eyars age or on any date thereafter to be specified in the notice:

Provided that no member of the Service under suspension shall retire from service except with the specific approval of the State Government concerned.

(2-A) A member of the service may, after giving three months' previous notice in writing to the State Government concerned, retire from service on the date on which he compeltes 20 years of qualifying service or any date thereafter to be

specified in the notice:

Provided that a notice of retirement given by a member of the service shall require acceptance by the State Government concerned if the date of retirement ont he expiry of the period of notice would be earlier than the date on which the member of the Service could have retired from servcie under sub-rule (2):

Provided that a notice of retirement given by a member of the service who, is on deputation a corporation or company wholly or substantially owned or controlled by the Government or to a body controlled or financed by the Government, shall not be eligible to retire from Service under this rule for getting himself permanently absorbed in such corporation, company, or body.

(3) The Central Government may, in consultation with the State Governmetn oncerned and after giving a member of the Service at least three months' previous notice in writing or three months' pay and allowance in lieu of such notice require that member to retire in public interest from service on the date on which such member completes thirty years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice.

Note1: In computing the period of three months' notice referred to in Sub-rules (2) and (3) the date of service of the notice and the date of expiry shall be excluded.

Note 2: In the case of a member of the service, who retires under Sub-rules (2) or (2-A) or who is retired under Sub-rule (3) the date of retirement shall be treated as a non-working day.

(4) A superannuation gratuity or pension shall be granted to a member of the service who is required to retire under Sub-rule (1) of this rule."

4.4 Mr. Shelat submitted that the petitioner was not "retained", but he was "reappointed" and in view of the order dated 17th December 1988 it is clear that the petitioner was not "retained", but he was only "reemployed".

4.5 Mr. Shelat has relied upon "Government of India's Decisions" which read as under:

(1) These rules do not contain any provision regarding reemployment of retired Indian Administrative/Police Service Officers. A question therefore arose by what rules their reemployment under State Government should be regulated.

(1.2) Indian Administrative/Police Officers are treated as non-cadre officers after their retirement. Their re-employment in cadre posts shall be regulated by rule 9 of Indian Administrative/Police Service (Cadre) Rules 1954. As regards reemployment in noncadre posts, State Government rules will apply."

4.6 Mr. Shelat submitted that the Note of Chief Minister is not the government decision and no decision can be taken based on the Note of the Chief Minister. He further submitted that in any case the the decision of the Chief Minister is implemented inasmuch as the original decision was to give post for two years, but in view of the direction of the then Chief Minister the petitioner was appointed for six years.

4.7 Mr. Shelat submitted that Gujarat Public Service Commission is a creation of Constitution and therefore it cannot be equated with the authority created under Government Resolution.

4.8 Mr. Shelat has relied upon a decision of the Supreme Court in the case of J.P. Bansal Vs. State of Rajasthan, reported in AIR 2003 SC 1405. He relied upon paras 7 and 8 of the said decision. In para 7 the decision dealt with the Article 166 of the Constitution which deals with the conduct of Government business. Para 8 thereof reads as under:

"We need not delve into the disputed question as to whether there was any cabinet decision, as it has not been established that there was any Government order in terms of Article 166 fo the Constitution. The Constitution requires that action must be taken by the atuhority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking the Council of Minsiters are advisors and as the head of the State, the Governor is to

act with the aid or advice of the Council of Minsiters. Therefore, till the advice is accepted by the Governor, views of the Council of Ministers does not get cyrstallised into action of the State. (See: The State of Punjab Vs. Sodhi Sukhdev Singh, AIR 1961 SC 493, Bachhittar Singh V. State of Punjab and another, AIR 1963 SC 395). That beign so, the first plea of the appellant is rejected."

4.9 Mr. Shelat has also relied upon a decision of the Supreme Court in the case of State of Bihar Vs. Kripalu Shankar, reported in AIR 1987 SC 1554. This decision deals with the effet of notings made by government officers in files. Mr.Shelat has relied upon paragraphs 9, 10, 11, 14, 15, 16, 17 and 18 of the said decision. For the present purpose, the observation made in paragraph 16 is as under:

"A study of Article 166 makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manenr provided in Article 166(2). Viewed in this light it cannot be said that what is contained in a notes file can ever be made the basis of an action either in cotnempt or in defamation since emre expression of a view or suggestion will not bring it within the vice of sub-sec (c) of S.2 of the Contempt of Courts Act, 1971, which defines Civil Countempt. Expression of a view is only a part of the thinking process preceding Goernment action."

4.10 In view of the above submissions Mr. Shelat submitted that there is no substance in the petition and the same deserves to be rejected.

5.0 Mr. Tanna has further contended that the Gujarat Subordinate Services Selection Board (GSSSB) is equivalent to GPSC as work of GPSC has now been been diverted and it has identical regulations having same status.

5.1 Mr. Tanna has submitted that under Rule 16 the petitioner has been "retained" and the petitioner was originally appointed when he was in the cadre post and thereafter he was in the non-cadre post and therefore he is entitled for pension and salary both.

5.2 Thus, the crux of the matter is whether the petitioner was entitled to full pension in addition to the salary in full admissible to him as Chairman of GSSSB.

6.0 I have considered the submissions of both the sides and perused the relevant documents on record.

6.1 From the Notification dated 17th December 1988 it is clear that the State Government had appointed the petitioner as Chairman of GSSSB for a period of six years or till he attains the age of 62 years, whichever is earlier. If the petitioner would have been retained in service, there was no question of issuing any fresh notification by the State Government for the purpose of appointing the petitioner on the said post. The respondent has, along with affidavit in reply, produced a an order relieving the as on 31sat December 1988 and taking charge on 1st January 1989. This would clearly show that the petitioner has accepted the position with all seriousness and in fact he was reappointed on the post in question.

6.2 On 9th February 1989 the petitioner has written a letter to the Secretary, General Administration Department, Gandhinagar, wherein, while giving the details of his pension, he clearly stated that his pay may be fixed on "re-employment".

6.3 The decision of the Chief Minister has been reflected in the order dated 17th December 1988. Therefore the contention raised by the petitioner that the petitioner is not given the status of GPSC Chairman is not born out from the record inasmuch as he was given the same "term" which was normally given to the Chairman of GPSC. From the Note of the Chief Minister it is clear that what is meant by the Chief Minister is the "term" i.e. period and not the terms and conditions . The term of six years was given to the petitioner and therefore he cannot have any grievance on this aspect. According to the respondents, the State Government had decided that the term governing such appointment should be the same as in the case of Chairman, GPSC and the same was extended to the petitioner.

6.4 In my opinion, the petitioner cannot seek shelter under the provisions of Clause 3(2) of the Government Resolution dated 26.3.1992 because that particular clause refers to the "first appointment" and not "reappointment". It goes without saying that the

petitioner was entitled to the salary as well as perquisites as Additional Chief Secretary to Government till he held the office of the Chairman of the said Board as "an in-Service IAS officer) i.e. upto 31st December 1988. But the moment he retired from IAS he ceased to get the salary and benefits as Additional Chief Secretary to Government and ceased to hold the office of Chairman of the said Board equated with "Additional Chief Secretary to Government". In fact the clause 3(3) of the said GR would be applicable to the petitioner with effect from 31st December 1988. Therefore the contention of the petitioner in this regard requires to be rejected.

6.5 The petitioner has claimed equation of the Ex-Cadre post of Chairman of the said Board with IAS Cadre post of Additional Chief Secretary to Government. From the record it is clear that the equation is done under Rule 9(1) of the IAS (Pay) Rules, 1954 and it will be clear on perusal of the said rule that it applies only to the in Service members of the IAS which cannot be made applicable to a retired person or to the post held by a retired officer. Therefore the petitioner cannot claim that the equation order issued by the Government at the time of his first appointment as Chairman as an In-Service officer would be relevant and valid even after his reappointment as a pensioner. This further requires to be read with the Government of India's decision below IAS (DCRB) Rules, 1958 which states that IAS officers are treated as non-Cadre officers after their appointment. Thus, the petitioner was not a cadre officer after his retirement and therefore he cannot claim continuity of service after his retirement from the service.

6.6 In view of the aforesaid discussion I am clearly of the opinion that from the order of 17th December 1988 it is clear that the petitioner was appointed afresh and if he was to retain in service, there was no need to issue a fresh notification. Therefore it is a reemployment and not retention.

6.7 The petitioner has sought to rely upon the regulations dated 26th March 1992. The petitioner was appointed in the year 1988 and in fact he was to retire in December 1992 and therefore clause 3(2) will not apply to the facts of the case inasmuch as the petitioner was not in service when the said rules came into force. The said rules cannot be given retrospective effect.

6.8 The Notification appointing the petitioner in consonance with the provisions of Bombay Civil Services Rules since the petitioner was covered under the said

rules no interference is called in this petition.

6.9 In the premises aforesaid, I do not find any substance in the present petition. The petition is, therefore, rejected. Rule is discharged with no order as to costs.

[K.S. JHAVERI, J.]

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